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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1279

RALPH H. ARABIAN, et al
Petitioners

v.

JOHN J. DALEY, et al

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

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This supplemental brief is filed pursuant to Rule 24 (5) calling attention to new pertinent information which was not available at the time petition for writ of certiorari was docketed.

This Court recently decided on March 5, 1979, Orr v. Orr, No. 77-1119, and the issues raised are closely related to those in the instant case. The decisions of this Court in Orr, supra support the issues raised in petitioners' writ of

certiorari. Appellant Orr questioned the constitutionality of Alabama's alimony statutes which provided that husbands but not wives may be required to pay alimony upon divorce. He requested that Alabama's alimony statutes be declared unconstitutional because they authorized courts to place an obligation of alimony upon husbands but never upon wives. Appellant Orr contended that the Alabama statutes on alimony, by virtue of their reliance on a gender-based classification violated the Equal Protection Clause of the Fourteenth Amendment. Because of the Alabama statutes, the lower court had ordered Appellant Orr to pay back alimony and attorney's fees.

APPLICATION OF ORR TO INSTANT CASE

1. Petitioners are questioning the constitutionality of a Massachusetts rule and statute, similar to that of Alabama, which provided that husbands but not wives may be required to pay attorney's fees for the wife upon divorce.

2. This Court decided in Orr, supra that appellant's failure to ask for alimony for himself did not deprive him of standing to attack the constitutionality of the Alabama statutes for underinclusiveness. Additionally, the Court found that there is no question that Appellant Orr bears a burden he would not bear were he female. Similarly, in the instant case, petitioners' failure to ask for attorney's fees for themselves should not deprive them of standing to attack the constitutionality of the Massachusetts statute and rule. Indeed, both petitioners Arabian and Schlichte bear a burden similar to that of Appellant Orr.

3. In Orr, supra, this Court found that Alabama's statutory scheme of imposing alimony obligations on husbands but not on wives on the basis of sex violated the Equal Protection Clause of the Fourteenth Amendment and agreed that the old notion that "generally it is the man's primary responsibility to provide a home and its essentials" can no longer justify a statute that discriminates on the basis of gender. The same conclusions should be drawn in the instant case regarding the awarding of attorney's fees for the wife upon divorce in Massachusetts. Petitioners allege, as in Orr, supra, that the Massachusetts statute and rule on attorney's fees, in effect at the time petitioners filed their complaint and as applied by the Massachusetts Probate Courts, by virtue of their absolute reliance on a gender-based classification, violates the Equal Protection Clause of the Fourteenth Amendment. (Petition, p.4)

CONCLUSION

The State of Massachusetts, like the State of Alabama, cannot be permitted to classify on the basis of sex, either by statute or as applied; therefore, this Court should apply the same principles and conclude as it did properly in Orr, supra, that the Massachusetts statute and rule governing attorney's fees in divorce, at the time petitioners filed their complaint, are unconstitutional, and that

all orders for attorneys' fees be vacated.

Respectfully submitted,

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